Central Cables Bhd v Tan Kim Lien

HIGH COURT (MELAKA) — CIVIL APPEAL NO 15–4 OF 2004
LOW HOP BING J
18 JULY 2006

Contract — Terms — Oral representations — Admission and undertaking — Settlement agreement — Refusal by defendant to execute — Whether case founded on oral admission and undertaking — Whether legally binding on defendant

Evidence — Conflicting testimony — Approach to take — Critically tested against the whole of the other evidence and circumstances of the case

The appellant/plaintiff commenced two suits against the respondent/defendant and Adco Sdn Bhd ('Adco') for goods sold and delivered. With a view to an amicable settlement, the plaintiff and the defendant had a meeting on 5 January 2001 ('the settlement meeting') wherein PJ Indah Sdn Bhd ('PJ Indah') of which the defendant was also the managing director had agreed to pay the plaintiff the sum of RM379,761.21 being the sum owed by Adco to the plaintiff. The plaintiff, contended that there was an oral agreement between the defendant and the plaintiff to the effect that the defendant had admitted and undertaken to pay, inter alia, RM20,000 to the plaintiff by way of settlement of the interest owed by Adco to the plaintiff. The oral agreement was allegedly recorded in five letters dated 9 January 2001, 12 January 2001, 10 April 2001, 29 August 2001 and 6 September 2001 (collectively 'plaintiffs five letters') issued by the plaintiff's solicitors to the defendant's solicitors, annexing letter of admission undertaking to execute before the defendant's solicitors. This was never executed. The sum of RM379,761.21 had been paid to the plaintiff and the two suits were withdrawn, but the defendant had failed to pay the sum of RM20,000 to the plaintiff. The defendant responded that there being no such oral agreement or undertaking by the defendant to pay the sum of RM20,000 adding that the alleged oral agreement cannot be proved by the plaintiff's five letters which were not from the defendant, and that the plaintiffs' claim was frivolous, vexatious and malicious. The magistrate dismissed the plaintiff's claim with costs.

Held, allowing the appeal:

(1) It need be noted that the plaintiff's cause of action was not based on a duly executed admission and undertaking. Plaintiff's pleaded case was founded upon an oral admission and undertaking by the defendant which the defendant had denied. The duly executed admission and undertaking had never been part of the pleadings by which the parties were bound (see paras 22–23).

(2) As the evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral admission and undertaking was sharply conflicting, the learned magistrate should have followed the safer approach set out for the Federal Court by Chang Min Tat FJ (as he then was) in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case. There was no indication in the magistrate's grounds of decision that this was done (see paras 28, 30).

(3) Neither the defendant's solicitors nor the defendant had ever disputed, objected to or derogated from any of the plaintiff's five letters. The defendant has however declined to execute the letter of admission and undertaking. Notwithstanding this, it is also significant to note that PJ Indah, of which the defendant was the managing director, had pursuant to para 3(i) of the unexecuted letter of admission and undertaking paid the sum of RM379,761.21 which was part and parcel of the sum of RM399,761.21 in para 2 thereof, leaving a balance of RM20,000 to be paid by the defendant to the plaintiff on or before 31 December 2001 pursuant to para 3(ii) thereof (see para 36).

(4) From the defendant's acts and deeds, it is a reasonable and indeed an irresistible inference that the said payment by PJ Indah was part and parcel of the larger package contained in the unexecuted letter of admission and undertaking which included the payment by the defendant of the balance of RM20,000 so as to treat the settlement as a whole. The defendant's admission and undertaking remains unaltered. The defendant's refusal to sign the letter of admission and undertaking means that it is now oral in nature but which is nonetheless legally binding on the defendant (see para 37).

[Bahasa Malaysia summary

Perayu/plaintif memulakan dua tindakan terhadap responden/defendan dan Adco Sdn Bhd ('Adco') untuk barangan yang dijual dan dihantar serah. Dengan tujuan menyelesaikannya, plaintif dan defendan mengadakan satu mesyuarat pada 5 Januari 2001 ('mesyuarat penyelesaian') di mana PJ Indah Sdn Bhd 'PJ Indah') yang mana defendan juga merupakan pengarah pengurusannya telah bersetuju membayar plaintif jumlah sebanyak RM379,761.21 yang merupakan jumlah yang dihutang oleh Adco kepada plaintif. Plaintif menyatakan bahawa terdapat satu perjanjian secara lisan di antara defendan dan plaintif di mana defendan mengakui dan berjanji untuk membayar, antara yang lain, RM20,000 kepada plaintif sebagai penyelesaian faedah yang dihutang oleh Adco kepada plaintif. Perjanjian secara lisan ini dikatakan telah direkodkan di lima surat-surat yang bertarikh 9 Januari 2001, 12 Januari 2001, 10 April 2001, 29 Ogos 2001 dan 6 September 2001 (kesemuanya 'lima surat plaintif') yang dikeluarkan oleh peguamcara plaintif kepada peguamcara defendan, melampirkan surat akuan dan akujanji untuk ditandatangani sebelum peguamcara defendan. Lampiran tersebut tidak ditandatangani. Jumlah RM379,761.21 telah dibayar kepada plaintif dan kedua-dua tindakan telah ditarik balik, tetapi defendan

telah gagal membayar jumlah RM20,000 kepada plaintif. Defendan menyatakan bahawa tiada perjanjian lisan tersebut ataupun akujanji untuk membayar defendan jumlah RM20,000 tersebut dan menyatakan juga bahawa perjanjian secara lisan tersebut tidak dapat dibuktikan melalui lima surat plaintif tersebut oleh kerana surat-surat tersebut bukannya daripada defendan, dan bahawa tuntutan plaintif tersebut adalah remeh, menyusahkan dan berniat jahat. Majistret menolak tuntutan plaintif dengan kos.

Diputuskan, membenarkan rayuan plaintif:

(1) Ia patut diperhatikan bahawa kausa tindakan plaintif bukannya berdasarkan atas perakuan dan akujanji yang telah ditandatangani. Plaintif memplidkan kesnya berdasarkan pengakuan secara lisan dan akujanji oleh defendan di mana defendan menafikannya. Perakuan dan akujanji yang ditandatangani tidak pernah menjadi pliding di mana pihak-pihak adalah terikat (lihat perenggan 22–23).

(2) Oleh kerana bukti yang dikeluarkan oleh pihak-pihak masing-masing berhubung dengan wujudnya atau tidak pengakuan dan akujanji secara lisan itu adalah bertentangan, majistret yang bijaksana seharusnya mengikut pendekatan yang dinyatakan di satu kes mahkamah persekutuan oleh Chang Min Tat FJ (pada ketika itu) dalam *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 iaitu merujuk dan berdasarkan pada tindakan dan perbuatan saksi-saksi yang semasa dengan keadaan dan inferens wajar diambil daripadanya, menambahkan lagi bahawa penerimaan kehakiman bukti-bukti memerlukan bukti secara lisan diuji secara kritikal dengan keseluruhan keterangan yang lain dan keadaan kes itu. Alasan penghakiman majistret tidak menunjukkan bahawa ini telah dilakukan (lihat perenggan 28, 30).

(3) Peguamcara defendan ataupun defendan tidak pernah mempertikaikan, membantah ataupun menjejaskan daripada mana-mana lima surat plaintif. Defendan telah tidak menandatangani surat pengakuan dan akujanji. Meskipun begitu, ia adalah penting bahawa PJ Indah, di mana defendan merupakan pengarah pengurusannya, telah mengikut perenggan 3(i) surat pengakuan dan akujanji yang tidak ditandatangani tersebut dan membayar jumlah RM379,761.21 yang merupakan sebahagian daripada jumlah RM399,761.21 di perenggan 2 tersebut, dan meninggalkan baki sebanyak RM20,000 untuk dibayar oleh defendan kepada plaintif pada atau sebelum 31 Disember 2001 mengikut perenggan 3(ii) surat tersebut (lihat perenggan 36).

(4) Daripada tindakan dan perbuatan defendan, inferens yang wajar dan tidak dapat dibendung bahawa bayaran oleh PJ Indah adalah sebahagian daripada satu pakej yang lebih besar terkandung di dalam surat pengakuan dan akujanji yang tidak ditandatangani itu, termasuk bayaran oleh defendan baki RM20,000 tersebut sebelum ia dikatakan satu penyelesaian yang sepenuhnya. Pengakuan dan akujanji defendan tidak diubah. Keengganan defendan menandatangani surat pengakuan dan akujanji tersebut bermakna ia sekarang adalah bersifat lisan tetapi mengikat defendan di sisi undang-undang (lihat perenggan 37).]

Notes

For cases on approach to take on conflicting testimony, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 792–793.

For cases on oral representation, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4756–4758.

Cases referred to

Ace King Pie Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75 (refd)
Chartered Bank, The v Yong Chan [1974] 1 MLJ 157 (refd)
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39 (refd)
MBF Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor [2003] 5 MLJ 303 (refd)
Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 (refd)
Sivapragasam Nagamany v Amaravathy v Nadeson & Anor [2001] 8 CLJ 706 (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

Legislation referred to

Evidence Act 1950 s 101
Rules of the High Court 1980 O 81 r 1(1)(a)

Appeal from: Civil Suit No 72–1766 of 2002 (Magistrate's Court, Melaka)

Gobindran a/l Thirunavakarasu (Kamarudin & Partners) for the appellant.
Wong Fook Meng (Chee Siah Le Ke & Partners) for the respondent.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellant-plaintiff ('the plaintiff') against the decision of the learned magistrate who had on 25 March 2004 dismissed the plaintiff's claim with costs.

FINDING OF FACTS

[2] Unless otherwise stated, after a full trial, the finding of facts by the learned magistrate may be unfolded as follows:

[3] The plaintiff has sold and delivered goods to a company known as Adco Sdn Bhd ('Adco') which has incurred an outstanding debt of RM379,761.21 due and owing to the plaintiff.

[4] In consideration of the sale and delivery of the goods thereof, vide letter of guarantee dated 24 May 1996, the defendant as Adco's managing director, together with another person, had jointly and severally guaranteed to pay the plaintiff to the extent of RM300,000 for any outstanding account and liabilities incurred by Adco. A

[5] By way of Melaka High Court civil suit No. 22–52–2000 which was subsequently transferred to and registered as Kuala Lumpur High Court civil suit No. D6–22–1878–2000 ('the first suit'), the plaintiff claims the sum of RM379,761.21 and RM300,000 respectively against Adco and the defendant, in addition to interest and costs. B

[6] The plaintiff also commenced Kuala Lumpur civil suit No. D2–22–1679–2000 ('the second suit') claiming a sum of RM300,000 together with interest and costs against the defendant. The second suit was based on the same cause of action in the first suit against the defendant. C

[7] With a view to an amicable settlement, the plaintiff and the defendant had a meeting on 5 January 2001 ('the settlement meeting') wherein PJ Indah Sdn Bhd ('PJ Indah') of which the defendant was also the managing director had agreed to pay the plaintiff the sum of RM379,761.21 being the sum owed by Adco to the plaintiff, together with interest claimed by the plaintiff at 8% pa on the sum of RM379,761.21 from 8 July 1999 to 5 January 2001 which amounted to RM45,446.49. D E

[8] At the settlement meeting, the defendant was alleged to have orally agreed with the plaintiffs representatives viz Madam Yong Le Chian and Mr Lim Oui Kiong to pay a sum of RM20,000 to the plaintiff on or before 31 December 2001, by way of settlement of the interest owed by Adco to the plaintiff. The oral agreement was allegedly recorded in five letters dated 9 January 2001, 12 January 2001, 10 April 2001, 29 August 2001 and 6 September 2001 (collectively 'plaintiff's five letters') issued by the plaintiff's solicitors to the defendant's solicitors, enclosing letters of admission and undertaking and setting out the terms of settlement for the abovesaid two suits, pursuant to which the sum of RM379,761.21 had been paid to the plaintiff and the two suits were withdrawn, but the defendant had failed to pay the sum of RM20,000 to the plaintiff. F G

[9] On 25 February 2002, plaintiff's solicitors issued a notice of demand addressed to the defendant's address given by the defendant in the letter of guarantee. There was no response by the defendant to the said notice of demand. H

[10] Subsequently, when the plaintiff's action was dismissed by the magistrate, the plaintiff lodged this appeal.

ORAL ADMISSION AND UNDERTAKING I

[11] Mr Wong Fook Meng, learned counsel for the plaintiff, submitted that there was an oral agreement between the defendant and the plaintiff to the effect that the defendant had admitted and undertaken to pay, inter alia, RM20,000 to the plaintiff.

[12] The following cases were referred to:

(1) *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, FC;

(2) *Sivapragasam Nagamany v Amaravathy v Nadeson & Anor* [2001] 8 CLJ 706, HC; and

(3) *Ace King Pie Ltd v Circus Americano Ltd & Ors*; [1985] 2 MLJ 75, HC.

[13] Defendant's learned counsel Mr Gobindran a/l Thirunavakarasu responded that the issue was whether there was an alleged oral agreement. He said that the sum of RM379,761.21 had been paid to the plaintiff, there being no such oral agreement or undertaking by the defendant to pay the sum of RM20,000 now claimed by the plaintiff, adding that the alleged oral agreement cannot be proved by the plaintiffs five letters which were not from the defendant, and that the plaintiffs said claim was frivolous, vexatious and malicious.

[14] On the basis of the above submissions, I am of the view that the issue for determination under this head may be stated as follows:

> Upon evaluating the entire evidence adduced at the trial in the court below, on a balance of probabilities, has the plaintiff succeeded in establishing the existence of an oral admission and undertaking by the defendant to pay the plaintiff the sum of RM20,000 claimed by the plaintiff?

[15] In relation to the alleged oral admission and undertaking, the appeal record reveals that in the court below, the parties called one witness each.

[16] Plaintiffs witness (SP1) who was in charge of the plaintiffs business operations testified that the defendant was at the material time the managing director of Adco. On 5 January 2001, four persons viz SP1, the defendant and two representatives from PJ Indah attended the settlement meeting.

[17] The date was arranged by the defendant. It was agreed that the sum of RM399,761.21 was to be paid to the plaintiff before the end of 2001, which was confirmed by the plaintiffs five letters to the defendant's then solicitors SM Kam & Associates of Batu 5 Jalan Kelang Lama 58200 Kuala Lumpur. A sum of RM379,761.21 had been settled by PJ Indah, while the balance of RM20,000 was to be paid by the defendant to the plaintiff by the end of 2001.

[18] Defendant SD1 who was the managing director of both Adco and PJ Indah testified in person to the effect that she was aware of the settlement meeting but denied she had ever agreed to pay the sum of RM20,000, adding that only the sum of RM379,761.21 had been agreed upon.

[19] Defendant denied having knowledge of the plaintiffs five letters, but admitted receiving a notice of demand dated 25 February 2002.

[20] The essence of the learned magistrate's grounds adverted to:

(1) the plaintiffs failure to call independent witnesses from PJ Indah in order to confirm the defendant's alleged admission and undertaking; and

(2) the plaintiffs withdrawal of the aforesaid two suits notwithstanding the defendant's non-execution of the letter of admission and undertaking.

[21] In relation to ground (1) above, I find that SD1 herself is also the witness from PJ Indah, as the managing director. SD1 was also the person who arranged for the date of the settlement meeting. It is reasonable to infer that she has full knowledge of the matters discussed and agreed thereat.

[22] A careful consideration of the learned magistrate's ground (2) leads me to the conclusion that he has focused on the requirement of a duly executed admission and undertaking by the defendant as a *sine qua non* for proving the plaintiffs claim. At this juncture, it needs to be noted that the plaintiff's cause of action is not based on a duly executed admission and undertaking. Plaintiff's pleaded case is founded upon an *oral admission and undertaking* by the defendant (see para 8 of the plaintiff's statement of claim) which the defendant has denied in para 6 of the defence.

[23] The duly executed admission and undertaking has never been part of the pleadings by which the parties are bound. The learned magistrate or any trial judge is legally bound to decide on the issues based on the pleadings and should not go beyond that: *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157; and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154.

[24] The existence or otherwise of an oral admission and undertaking is to be resolved by way of the discharge of burden of proof.

[25] Section 101 of the Evidence Act 1950 provides as follows:

101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[26] As the plaintiff desires the court below to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the existence of an oral guarantee, the plaintiff must prove that those facts exist, in accordance with s 101(1). Under s 101(2), the burden of proof lies on the plaintiff (see also *MBF Finance Bhd v Sim Peng Bee @ Sim Bay Bee & Anor* [2003] 5 MLJ 303, HC; *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673, HC; and *Nuri Asia Sdn Bhd v Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307, HC.

A **[27]** As this is a civil case, the burden of proof may be discharged by the plaintiff on a balance of probabilities, ie that the plaintiff's version is probably true.

[28] As the evidence adduced by the parties respectively pertaining to the existence or otherwise of an oral admission and undertaking is sharply conflicting, the learned magistrate should have followed the safer approach set out for the Federal Court by Chang Min Tat FJ (as he then was) in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, ie to refer to and rely on the witness' acts and deeds which were contemporaneous with the event and to draw reasonable inferences from them, adding that judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case.

[29] The above approach was also applied by James Foong J (now JCA) in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332 and by me in *Nuri Asia Sdn Bhd*.

D **[30]** However, there was no indication in the magistrate's grounds of decision that this was done.

[31] On my part, it is significant to note that after the settlement meeting, the plaintiffs solicitors had written to the defendant's then solicitors on 9 January 2001 to confirm the terms of the settlement contained in the annexed letter of admission undertaking and to execute before the defendant's solicitors. The terms of settlement include, inter alia, the sum of RM399,761.21 out of which Adco was to pay RM397,761.21 and the balance of RM20,000 was to be paid by the defendant.

[32] On 12 January 2001, vide the second letter issued by the plaintiff's solicitors to the defendant's then solicitors, the plaintiff's solicitors confirmed the teleconversation between the plaintiff's solicitor Miss Ng Geok Kuan and defendant's solicitor Mr Kam in relation to the defendant's admission and undertaking. The plaintiff's solicitor had forwarded three copies of the defendant's admission and undertaking, with the words 'end of the year 2001' in para 3(ii) therein to be replaced by the words 'on or before 2001'.

[33] Vide the third letter dated 10 April 2001, plaintiff's solicitors Mr Wong Fook Meng confirmed the teleconversation with the defendant's solicitors Mr Kam on the same subject matter requesting the defendant's solicitors to advise the defendant to execute the same on or before 30 April 2001.

[34] The fourth letter dated 29 August 2001 issued by the plaintiff's solicitors to the defendant's then solicitors confirmed that the settlement cheques amounting to RM379,761.21 in respect of the first suit had been cleared and that the balance sum of RM20,000 was to be paid by the defendant on or before 31 December 2001, for which the defendant has to execute the letter of admission and undertaking.

[35] The fifth letter dated 6 September 2001 from the plaintiff's solicitors to the defendant's then solicitors confirmed that the defendant had agreed to pay the sum of RM20,000 on or before 31 December 2001.

[36] Neither the defendant's solicitors nor the defendant had ever disputed, objected to or derogated from any of the plaintiff's five letters. The defendant has however declined to execute the letter of admission and undertaking. Notwithstanding this, it is also significant to note that PJ Indah, of which the defendant was the managing director, had pursuant to para 3(i) of the unexecuted letter of admission and undertaking paid the sum of RM379,761.21 which was part and parcel of the sum of RM399,761.21 in para 2 thereof, leaving a balance of RM20,000 to be paid by the defendant to the plaintiff on or before 31 December 2001 pursuant to para 3(ii) thereof.

[37] Apparently, there was a change of mind by the defendant when the two suits were withdrawn by the plaintiff on 17 April and 4 September 2001 respectively. From the defendant's acts and deeds, it is a reasonable and indeed an irresistible inference that the said payment by PJ Indah was part and parcel of the larger package contained in the unexecuted letter of admission and undertaking which included the payment by the defendant of the balance of RM20,000 so as to treat the settlement as a whole. The defendant's admission and undertaking remains unaltered. The defendant's refusal to sign the letter of admission and undertaking means that it is now oral in nature but which is nonetheless legally binding on the defendant.

[38] The following three authorities would fortify the proposition expounded by me above.

[39] In *Lim Keng Siong*, the defendants had indicated their wish to dispose of land in Melaka at S$5.40 per sq ft for which they had appointed a registered estate agent. Further telephone negotiations had brought down the agreed price to S$5.20 per sq ft and the defendants had appointed a firm of solicitors in Melaka to deal with all legal matters pertaining to the above sale. This oral negotiation was confirmed by the letter from the registered estate agent to the defendants who or whose solicitors have neither objected to or derogated from. The defendants subsequently refused to complete the agreement and the plaintiff applied for specific performance. The issue was whether there was a concluded contract of sale at the orally agreed price of S$5.20 per sq ft. In a well considered judgment, Wan Yahya J (later SCJ) gave the answer in the affirmative. On appeal, the Federal Court through the judgment of Abdul Hamid FJ (later CJ Malaysia) affirmed the High Court judgment, and held at p 491 left to p 49A right, inter alia, that the mere fact that a written contract had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement.

[40] In *Sivapragasam* the facts reveal that in 1960 the plaintiff's father, N since deceased, had purchased property from its legal and beneficial owners M and L. As the parties to the purchase were close relatives, no formal documentation was prepared or executed in respect of the transaction. M and L undertook to transfer the property to N, but M died in 1966, after which the property was transferred to L upon L's undertaking to transfer it to M, which was not done. Till M's death in February 1973 and L's demise in March 1973, the property remained in L's name. Subsequently, Mrs M approached the first defendant who was one of the administratrixes of L's estate and who had orally agreed to transfer the property to

Mrs M upon letters of administration being extracted and the necessary orders obtained. Further to the promise, in February 1974, the first defendant instructed a solicitor to prepare an agreement to transfer the property to Mrs N which the solicitor did. However, in September 1974, the first defendant withdrew her verbal undertaking to transfer the property. Mrs N relied on O 81 r 1(1)(a) of the Rules of the High Court 1980 and sought, inter alia, specific performance of the first defendant's oral promise. The defendants argued that if at all there was an agreement, it was unenforceable in law.

[41] PS Gill J (later FCJ) granted an order in terms, rejecting, at p 7160, the defendant's argument as totally misconceived, and holding, at p 718h, that the draft agreement prepared by a solicitor between Mrs N and the first defendant containing the agreed salient features, *albeit* not executed, more than sufficed for a concluded contract.

[42] The third and final authority is *Ace King Pie Ltd* where the plaintiffs' claim was based on an agreement between the plaintiffs and the defendants. The terms thereof had been agreed upon but the contract between them had not been signed. Zakaria Yatim J (later FCJ) held that at p 77H to I right and p 78A-B left, a contract had been concluded, referring to *Chitty on Contracts* (24th Ed) Vol 1 p 102 para 100.

CONCLUSION

[43] On the foregoing grounds, I hold that the learned magistrate had erred in arriving at his decision. I therefore allow this appeal with costs, set aside the said decision, and enter judgment in terms of the plaintiffs claim.

Reported by Sally Kee